UPDATE ON DEBT COLLECTION ISSUES

AND DEVELOPMENTS

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UPDATE ON THE FDCPA

The Fair Debt Collection Practices Act is found at 15 U.S.C. § 1692, will be referred to as the Act or FDCPA, and will be referred to by section number only. The purpose of the Act is seemingly simple: "...to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers...". However, the FDCPA has been described as a misdirected and poorly drafted statute, and has resulted in unforeseen consequences that go well beyond the original purposes.

The Oklahoma Rules of Professional Conduct are found at Title 5 O.S., App. 3-A, will be referred to as the Rules, and will referred to by rule number only.

THE FEDERAL TRADE COMMISSION ANNUAL REPORT 2010:

FAIR DEBT COLLECTION PRACTICES ACT

Each year the Federal Trade Commission reports to Congress on the Fair Debt Collection Practices Act. The FDCPA requires the FTC to report on the level of industry compliance with the law. The following is a summary of the details of this year's Report.

The FDCPA vests the Federal Trade Commission (FTC) with primary enforcement responsibility. It shares overall enforcement responsibility, however, with other federal agencies. In addition, consumers who believe they have been victims of FDCPA violations may seek relief in state or federal court. This report summarizes: (1) the types of consumer complaints the FTC received in 2009; (2) recent developments in FTC law enforcement; and (3) the FTC's 2009 consumer and industry education and policy initiatives.

The FTC acknowledges that not all of the debt collection practices about which consumers complain are law violations. Certainly, many consumers do complain of conduct that, if accurately described, violates the FDCPA. The FTC, however, does not verify that the information consumers provide is accurate unless the agency undertakes such an inquiry in connection with its law enforcement activities.

Even if accurately described, some conduct about which consumers complain does not violate the FDCPA. For example, consumers sometimes complain that a debt collector will not accept partial payments on the same installment terms that the original lender provided when the account was current. Although a collector's demand for accelerated payment or larger installments may be frustrating to the consumer, such a demand generally does not violate the FDCPA. Also, for example, if a consumer complains that a debt collector has threatened to file a civil lawsuit to collect a debt, the FTC cannot determine whether such conduct violates the FDCPA without investigating whether the debt collector had the requisite intention to file suit.

In 2009, consumer complaints to the FTC about third-party debt collectors ("FDCPA complaints") increased in absolute terms, but decreased as a percentage of all complaints that consumers filed directly with the FTC. The FTC received 88,190 FDCPA complaints about third-party debt collectors in 2009. This represents 16.8% of all complaints received directly from consumers in 2009. By comparison, in 2008, the FTC received 78,925 third-party debt collector complaints, representing 19% of the complaints received directly from consumers that year.

In evaluating the complaints the FTC received in 2009 relative to those received in 2008, it is important to recognize that in June 2008 the agency substantially changed the way it processes complaints it receives over the Internet. the agency changed from a form-based web complaint system to an interactive, question-based web complaint system. Although both systems permit a single complaint to be coded for multiple law violations, this change in the FTC's web-based complaint system appears to have resulted in an increase in the number of law violations reported per complaint.

COMPLAINTS BY CATEGORY

In addition to evaluating the total number of complaints about third-party debt collectors, it also is instructive to consider the specific types of debt collection practices about which consumers complain. Because consumers frequently complain about more than one debt collection practice, the FTC historically has assigned many complaints more than one code. Thus, if one adds together all the

complaints for each of the fifteen debt collection codes each year, the total exceeds the number of FDCPA complaints the FTC actually received in that year.

HARASSING THE ALLEGED DEBTOR OR OTHERS: This complaint category encompasses four distinct violation codes. Under the FDCPA, the debt collectors may not harass consumers to try to collect on a debt. In 2009, 46.5% of FDCPA complaints the FTC received, or 41,028 complaints, claimed that collectors harassed the complainants by calling repeatedly or continuously. This was the most frequent law violation about which consumers complained during 2009, as it was in 2008, when 27,413 complaints, representing 34.75% of FDCPA complaints, stated that the collectors harassed them by calling repeatedly or continuously. Also in 2009, 14,321 complaints, or 16.2% of FDCPA complaints, claimed that a collector had used obscene, profane, or otherwise abusive language. Nine thousand, six hundred eighty-four complaints (9,684), or 11% of 2009 FDCPA complaints, said that collectors called before 8:00 a.m., after 9:00 p.m., or at other times that the collectors knew or should have known were inconvenient to the consumer. Two thousand, five hundred seventeen (2,517) complaints, or 2.9% of 2009 FDCPA complaints, reported that collectors used or threatened to use violence if consumers failed to pay.

DEMANDING A LARGER PAYMENT THAN IS PERMITTED BY LAW: This category includes two different FDCPA law violation codes. First, the FDCPA prohibits debt collectors from misrepresenting the character, amount, or legal status of a debt. The types of complaints that fall into this category include, for example, reports that a collector is attempting to collect either a debt the consumer does not owe at all or a debt larger than what the consumer actually owes. Other complaints in this category state that collectors have sought to collect on debts that have been discharged in bankruptcy.

Second, the FDCPA prohibits debt collectors from collecting any amount unless it is "expressly authorized by the agreement creating the debt or permitted by law". In 2009, 10.9% of FDCPA complaints, or 9,632 complaints, asserted that collectors demanded interest, fees, or expenses that were not owed (such as collection fees, late fees, and court costs), up from 7.5% of FDCPA complaints (5,948 total) in 2008.

THREATENING DIRE CONSEQUENCES IF CONSUMER FAILS TO PAY: The FDCPA bars debt collectors from making threats as to what might happen if the consumer fails to pay the debt, unless the collector has the legal authority and the intent to take the threatened action. Among other things, collectors may threaten to initiate civil suit or criminal prosecution, garnish wages, seize property, cause job loss, have a consumer jailed, or damage or ruin a consumer's credit rating. In 2009, 20.9% of FDCPA complaints, or 18,438 complaints, reported that third-party collectors falsely threatened a lawsuit or some other action that they could not or did not intend to take, an increase from the 15% of complaints (11,804 total) that reported the same in 2008. Also in 2009, 13% of FDCPA complaints, or 11,505 complaints, alleged that such collectors falsely threatened arrest or seizure of property, up from the 8.1% of FDCPA complaints (6,412 total) reporting such conduct in 2008.

IMPERMISSIBLE CALLS TO CONSUMER'S PLACE OF EMPLOYMENT: Under the FDCPA, a debt collector may not contact a consumer at work if the collector knows or has reason to know that the consumer's

employer prohibits such contacts. By continuing to contact consumers at work under these circumstances, debt collectors may put them in jeopardy of losing their jobs. In 2009, 13.6% of FDCPA complaints, or 11,973 complaints, related to calls to consumers at work. This is an increase from 10.3% of FDCPA complaints, or 8,103 complaints, in 2008.

REVEALING ALLEGED DEBT TO THIRD PARTIES: The FDCPA generally prohibits third-party contacts for any purpose other than obtaining information about the consumer's location. Collectors calling to obtain location information also are prohibited from revealing that a consumer allegedly owes a debt.

In some cases, collectors reportedly have used misrepresentations as well as harassing and abusive tactics in their communications with third parties, or even have attempted to collect from the third party.

In 2009, 12.2% of all FDCPA complaints, or 10,758 complaints, reported that debt collectors illegally disclosed a purported debt to a third party, up from 8.8% of FDCPA complaints, or 6,955 complaints, in 2008. The third parties contacted included employers, relatives, children, neighbors, and friends. This past year, 19.2% of complaints, or 16,926 complaints, claimed that collectors called a third party repeatedly to obtain location information about the complainant, up from 16.1% of FDCPA complaints, or 12,710 complaints, in 2008.

FAILING TO SEND REQUIRED CONSUMER NOTICE: The FDCPA requires that debt collectors send consumers a written notices that includes, among other things, the amount of the debt, the name of the creditor to whom the debt is owed, and a statement that, if within thirty days of receiving the notice the consumer disputes the debt in writing, the collector will obtain verification of the debt and mail it to the consumer. Many consumers who do not receive the notice are unaware that they must dispute their debts in writing if they wish to obtain verification of the debts. Last year, 25.7% of the FDCPA complaints, or 22,708 complaints, reported that collectors did not provide the required notice, up from 15.7% of all FDCPA complaints, or 12,374 complaints, in 2008.

FAILING TO VERIFY DISPUTED DEBTS: The FDCPA also mandates that, if a consumer submits a dispute in writing, the collector must cease collection efforts until it has provided written verification of the debt. Many consumers complained that collectors ignored their written disputes, sent no verification, and continued their collection efforts. Other consumers reported that some collectors continued to contact them about the debts between the date the consumers submitted their dispute and the date the collectors provided the verification. Last year, 11.5% of all FDCPA complaints, or 10,158 complaints, claimed that collectors failed to verify disputed debts, up from 8%, of all FDCPA complaints, or 6,345 complaints, in 2008.

CONTINUING TO CONTACT CONSUMER AFTER RECEIVING "CEASE COMMUNICATION" NOTICE: The FDCPA require debt collectors to cease all communications with a consumer about an alleged debt if the consumer communicates in writing that he or she wants all such communications to stop or that he or she refuses to pay the alleged debt. This "cease communication" notice does not prevent collectors or creditors from filing suit against the consumer, but it does stop collectors from calling the consumer or sending dunning notices. In 2009, 8.4% of FDCPA complaints, or 7,411 complaints, reported that

collectors ignored "cease communication" notices and continued their collection attempts, up from 6.4% of complaints (5,013 complaints) reported by such complainants in 2008.

In June 2009, the FTC settled an action against Oxford Collection Agency, Inc., its officers, and an attorney who acted as its agent, for collection practices allegedly in violation of the FTC Act and the FDCPA. The FTC's complaint alleged that the defendants falsely threatened to garnish consumers' wages, bring lawsuits against them, or have them arrested. It also charged that the defendants used illegal and abusive collection methods such as calling consumers before 8 a.m. or after 9 p.m.; calling their workplace when the collectors knew or had reason to know that the calls were inconvenient; telling employers, co-workers, relatives, and neighbors about the consumers' debts; continuing to call after receiving consumers' written demands to stop; calling consumers repeatedly throughout the day; calling back immediately after the consumer hung up; and using profane or other abusive language. Separate FTC settlements, one with Oxford and its officers, and the other with the attorney and his law firm, each imposed a civil penalty which was partially or wholly suspended based on inability to pay. Both settlements enjoin the defendants from violating the FDCPA, and from making misrepresentations in connection with the collection of a debt.

In September 2009, the FTC concluded its case against Academy Collection Service, Inc., by settling with the two remaining corporate officer defendants, Albert Bastian and Edward Hurt III, who operated Academy's Las Vegas collection center. The complaint alleged that the individual defendants "formulated, directed, participated in, controlled, or had the authority to control" the actions of Academy's collectors, which included (1) misleading, threatening, and harassing consumers; (2) depositing postdated checks early; (3) falsely threatening or implying that the company would garnish consumers' wages, seize or attach their property, or initiate lawsuits against the consumers if they failed to pay; (4) making unfair and unauthorized withdrawals from consumers' bank accounts; (5) communicating impermissibly with third parties about consumers' alleged debts; and (6) engaging in harassing or abusive behavior, such as threatening the use of physical violence, using obscene or profane language, and repeatedly ro continuously causing the telephone to ring. The settlement imposes civil money judgments against Mr. Bastian and Mr. Hurt of $375,000 and $300,000, respectively, which were partially suspended based on their inability to pay. The consent decree enjoins them from violating the FDCPA and from, in connection with debt collection, making withdrawals from consumers' bank accounts without express informed consent and from making misrepresentations.

In February 2010, the FTC settled an action against Credit Bureau Collection Services and two of its officers to resolve allegations that the defendants violated the law in the course of collecting debts from consumers. Among other things, the complaint alleged that the defendants violated the FDCPA by misrepresenting both to consumers and to consumer reporting agencies (CRAs) that consumers owed the debts and by failing to inform the CRAs that those debts were disputed by consumers. The complaint also alleged that the defendants violated the FTC Act by misrepresenting that consumers owed debts or by failing to have a reasonable basis for such representations. The consent decree filed requires the defendants to pay a $1,095,000 civil penalty. Among other things, it also prohibits violations of the FDCPA, and requires the defendants to have a reasonable basis for representations that a consumer

owes a debt, and requires them to conduct a reasonable investigation when the truth of those representations is cast in doubt.

COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

Rule 4.2., Communication with Person Represented by Counsel, provides: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation or transaction, who is represented by counsel concerning the matter to which the communication relates. This Rule does not prohibit communication with a represented party, or an employee or agent of such a person, concerning matters outside the representation. In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. The prohibition of communication with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that a lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances.

The FDCPA contains a specific prohibition on communicating with a debtor represented by an attorney. Section 1692c provides in part that, without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address unless the attorney fails to respond within a reasonable period of time.

A consumer's attorney notified the creditor of representation and settled the debt. The creditor then retained a debt collector who wrote to the consumer seeking payment of the balance of the debt not knowing of the consumers' representation and payment. Summary judgment was granted for the defendant: An agent cannot be imputed with information that his principal failed to give him. See, Jones v. Weiss, 95 F. Supp. 2d 105 (N.D.N.Y. 2000).

The consumer must demonstrate actual knowledge by the debt collector of the consumer's legal representation to establish a violation. Hubbard v. National Bond & Collection Assocs., Inc., 126 B.R. 422 (D. Del. 1991).

Once it is known that the consumer debtor is represented by an attorney, the debt collector can not communicate directly with the consumer unless the attorney expressly authorizes it or fails to respond

to communications within a reasonable period of time. What period of time is reasonable? The best procedure is to always follow up with a communication to let the attorney know that you believe he or she has not responded within a reasonable time and that you will communicate with the consumer if you do not have a response by a certain date.

The only time continued communication with the consumer might be allowed is when they refuse to provide the name of their attorney. Our firm policy is, if they state they have an attorney, to request that they provide the attorney's name. If they still refuse to do so, we request they have their attorney contact us. If there is still no contact within a reasonable amount of time, it should not be a violation to assume they really don't have an attorney and contact them directly. Of course, it is very important that your file be carefully documented regarding all such contacts. All telephone calls must be carefully documented, including what both parties to the call said and that the debt collector provided the fair debt warning to the consumer.

DEALING WITH THE UNREPRESENTED PERSON

Rule 4.3., Dealing with Unrepresented Person, provides: In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. A lawyer shall not give advice to such a person other than the advice to secure counsel, if the interests of such person are, or have a reasonable possibility of being, in conflict with the interests of the client.

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The Act contains a specific section regarding false or misleading representations. Section 1692e provides in part that a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.

Some attorneys in their validation notices and/or other collection letters make threats of certain specified legal action or paint pictures of doom and gloom to result from debtor's nonpayment. Such collection letters can run afoul of both Rule 4.3 and the FDCPA.

The consumer collection attorney must also understand that both Rule 4.3 and the FDCPA suggest and/or presume that the debtor is susceptible to "misunderstandings" and really is a "least sophisticated consumer."

Rule 4.3 suggests that the unrepresented consumer debtor may somehow misunderstand the role of the attorney consumer debt collector as that of being "disinterested in loyalties" or a "disinterested authority on the law."

In evaluating the debt collector's conduct under the "unsophisticated" or "least sophisticated consumer" standard, the courts view such conduct objectively from the perspective of a consumer whose circumstances make him relatively more susceptible to harassment, oppression or abuse. Indeed, the

debt collector's and the debtor's own respective individual perceptions of harm are irrelevant as the courts view the debt collector's conduct through the eyes of this theoretical "least sophisticated consumer," who according to various decisions are "uninformed, naive, trusting and below intelligence," "not a Philadelphia lawyer" or even an average everyday common consumer and are "closer to the bottom of the sophistication meter."

From the standpoint of the FDCPA, an attorney may not represent or imply that certain specific legal remedies specified in § 1692e(4) may result from nonpayment of a debt, unless each such remedy is both lawful and is actually intended to be taken. Cacace v. Lucas, 775 F. Supp. 502, (D. Conn. 1990).

In Blum v. Fisher and Fisher, 961 F. Supp. 1218, (N.D. Ill.1997), the court held that the statutory list of FDCPA deceptive debt collection practices is not exhaustive. A single act of deception is sufficient to trigger liability under the FDCPA. Inclusion in the debt collection letter of a note stating the consumer-mortgagor might be able to continue living on mortgaged property rent-free for seven months after foreclosure may have created a false or misleading impression which lulled the unsophisticated consumer into inaction. Inclusion in the debt collection letter of partial remedies available to debtor-mortgagor may have created a false or misleading impression that the collection lawyer was looking out for the interests of the debtor and lulled the unsophisticated consumer into inaction.

RESPECT FOR RIGHTS OF THIRD PERSONS/HARASSMENT OPPRESSION AND ABUSE

Rule 4.4., Respect for Rights of Third Person, provides: In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

Rule 4.4 dovetails with § 1692d which provides in part that a debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.

Although a debt collector's conduct may not fall under one of the six specific prohibitions, courts will examine the conduct to determine if it violates the general prohibition against harassment, oppression or abuse.

SUPERVISING NONLAWYER STAFF/UNAUTHORIZED PRACTICE OF LAW

Rule 5.3., Responsibilities Regarding Nonlawyer Assistants, provides: With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

The lawyer must supervise work done by lay personnel as agents of the lawyer, and stands responsible for its product. State ex rel. Oklahoma Bar Ass'n v. Braswell, Okla., 663 P.2d 1228 (1983).

Moreover, with regard to non-attorney employee debt collectors and the FDCPA, the doctrine of respondeat superior applies. Therefore, an FDCPA violation or alleged violation by a non-attorney debt collector (collector, paralegal, secretary, skip tracer, etc.) employed by a law firm can easily result in a suit or claim against both the individual non-attorney debt collector and the law firm entity employer.

The furnishing of deceptive forms under §1692j creates the same civil liability as other FDCPA violations. Once again, under this section, an attorney must never provide letterhead to his or her creditor client so that the client can make it appear that a debt collection letter has been sent by the attorney's office! This could be a violation of the Rules which prohibit an attorney from assisting a non-member of the bar in the unauthorized practice of law.

Rule 5.5., Unauthorized Practice of Law, provides: A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. Likewise, it does not prohibit

lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in governing agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.